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No. 80-273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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ARGUMENT

Petitioners submit this Reply Brief in response to the briefs in opposition filed by the federal respondents, the State of Maryland, the Steamship Trade Association of Baltimore and proposed *amici* Bair Island Investments, Inc. and Redwood Shores, Inc.

While the briefs in opposition make several assertions with which we take issue *infra*, they are most notable for what they do not say. The central contentions in the petition were that (a) a Circuit split had developed, (b) the issue presented was important and likely to recur, and (c) the decision below was fundamentally flawed and erroneous. Only one of those three points — the Circuit split — is squarely disputed by the Solicitor

General, who implicitly concedes that the issue presented herein is significant, and who is unwilling to defend the decision below upon its own terms, seeking instead to modify the holding and recast the reasoning of the court of appeals.[1]

1. The Issue Presented Is Important

The petition pointed out that the issue presented herein is important (Pet. 14-16). It noted, as did the court below (Pet. App. 5a n.5, 17a n.10, 19a), the impetus for increased construction of diked disposal areas, stemming both from the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act Amendments of 1977. This impetus demonstrates that the issue presented herein will recur regularly, and that substantial public funds will be expended on projects which may ultimately be found to be illegal (Pet. 14-16, 21).

The briefs in opposition do not seriously dispute the importance of the question presented. The Solicitor General, who argued that precisely the same issue was substantial enough to warrant this Court's review in *Hudson Valley*[2] (when no Circuit split yet existed), is silent on the subject. The Steamship Trade Association candidly admits the trend toward use of such disposal sites (Steamship Br. 10), while the State of Maryland weakly asserts that the precise number of such projects is "uncertain" and the claimed expenditure of public funds is "speculative" (Md. Br. 12).[3]

Additionally, the presence of two national environmental groups seeking leave to appear as *amici* in support of the peti-

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[1] This Reply Brief is focused principally upon the Solicitor General's brief since most of the contentions made by the other respondents or *amici* are redundant of the Solicitor General's position or involve mere parroting of the Fourth Circuit's opinion.

[2] *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir.), *cert. denied sub nom. Parker* v. *Citizens Committee for the Hudson Valley*, 400 U.S. 949 (1970) (Harlan, White and Blackmun, JJ., dissenting from denial of *certiorari*) (hereinafter *Hudson Valley*).

[3] Our contention that failure to resolve this issue promptly may result in the waste of public funds is underscored by the recent decision in *Sierra Club* v. *Leslie Salt Co.*, No. C-72-561 (N.D. Cal., Jan. 15, 1980) (reproduced in Md. Appendix). In that case, the

tion, and two corporations seeking to appear as *amici* in opposition, demonstrates that the issues presented herein extend far beyond the factual circumstances presented or the definition of "dike."[4]

2. A True Circuit Split Exists

Aside from the importance of the question presented, there is a clear divergence of views between the Second and Fourth Circuits concerning the scope of Section 9. Although *Hudson Valley* came to the opposite conclusion from that reached by the court below concerning the scope of Section 9, respondents have tendered three arguments as to why there is no "real" circuit split here.

First, they argue that the Second Circuit in *Hudson Valley* did not have before it various legislative and administrative materials which were deemed significant below (Fed. Resp. Br. 15; Md. Br. 8-9; Bair Island Br. 7). This argument is simply incorrect. Despite Maryland's claims about the "wealth" of legislative materials (Md. Br. 8-9), the Solicitor General has forthrightly admitted that "there are virtually no legislative materials directly relating to the 1899 Act itself" (Fed. Resp. Br.

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court refused to follow *Hudson Valley* precisely because such a course would cause a retroactive declaration that several completed projects were illegal (Md. App. 14a-15a). Although relief might well be denied in such circumstances on laches or other equitable grounds, such retroactivity problems provide no basis for misconstruing Section 9 and thereby denying Congress its statutorily-reserved authority to pass upon such projects. The best solution to this dilemma is for this Court to grant *certiorari* in this case, in which construction has not yet begun, resolve the issue definitively, and therby permit the Corps to proceed in a lawful manner in all future cases.

[4] The unusual strategem of an *amicus* brief opposing *certiorari* not only underscores the broad importance of this case, but also indicates those *amici's* doubts as to the correctness of the decision below and their desire to avoid a review of the instant case in this Court.

12 n.9). And with regard to supposedly new contentions based upon "administrative practice," the Corps made essentially the same contention in *Hudson Valley* as it does here:

> "The Act of 1899 does not define a 'dike,' nor is any definition found in the legislative history. However, the Corps of Engineers has, since the passage of the 1899 Act, required applicants to obtain the consent of Congress as to 'dikes' (as we understand the term) prior to obtaining a permit but has issued permits for landfill (and other activities under Section 10) with only the Secretary's approval. . . . [W]e now have 70 years of [administrative] practice whereby the type of permit issued here has been consistently authorized by the Secretary of the Army without such authorization by Congress." Court of Appeals Brief for Federal Appellants in *Hudson Valley,* pp. 25-26.

Contrary to the contention of the Solicitor General that the *Hudson Valley* court noted "the absence of any legislative or judicial authority" (Fed. Resp. Br. 15), the court actually stated that:

> "In the absence of any legislative or judicial authority *to support the defendants' theory of statutory interpretation* we apply the ordinary meaning to the term 'any dike.'" 302 F. Supp. at 1089 (emphasis supplied).[5]

Thus, the court in *Hudson Valley* did nothing substantially different from what the district court did in this case (Pet. App. 42a-46a; on reconsideration, 47a-52a) — it flatly rejected the Corps' convoluted administrative practice arguments in favor of reliance upon the statutory language.

Second, it is argued that *Hudson Valley* is not really contrary to the decision below, because after adopting plaintiff's proposed definition of "dike," the district court added a *dictum* to the effect that the project in question also appeared to meet the Corps' definition of "dike" (Fed. Resp. Br. 16). Aside from the insignificance of such a *dictum* in determining whether there is a conflict between the holdings of the two courts, and aside from the fact that the Second Circuit clearly affirmed the district court's principal holding rather than this off-handed *dictum* (425 F.2d at 106), it should be noted that this alternative defini-

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[5] The only materials absent from the record in *Hudson Valley* were not legislative history, but rather post-enactment hearing materials, the insignificance of which is illustrated below (*see* pp. 8-9, *infra*).

tion of "dike" is also in conflict with the Fourth Circuit's holding herein, since even the Corps' proposed definition of "dike" in *Hudson Valley* did not require the structure to span a waterway. 302 F. Supp. at 1088-89.

Third, respondents argue that there is a "trend" against the views of the Second Circuit among the district courts (Fed. Resp. Br. 18-19; Md. Br. 9-11; Steamship Br. 9, 11-12). Whatever the legal significance of this claimed district court trend, no real trend appears. Although three district courts have espoused the same conclusion reached below (one later vacated on appeal as moot and one with an alternative holding[6]), two district courts have followed *Hudson Valley* — Judge Murray's decision in the instant case, and *Sierra Club* v. *Morton*, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975), *aff'd in part and rev'd in part on other grounds*, 610 F.2d 581 (9th Cir. 1979), *cert. granted on other issues*, Nos. 79-1252 and 79-1502 (Oct. 6, 1980). There is simply no significant trend.

Finally, the Solicitor General suggests a variety of other circumstances in which *certiorari* might be more appropriately granted — upon a reiteration by the Second Circuit of its *Hudson Valley* holding, or upon a reversal of *Leslie Salt* in the Ninth Circuit (Fed. Resp. Br. 18-19). However, these alternatives may well be unavailable, since the Corps is apparently abiding by the *Hudson Valley* decision within the Second Circuit, precluding a case from arising there, and since the retroactivity issue and other unique aspects of *Leslie Salt* may make it a poor vehicle for this Court's review. Given the importance of the question and the existence of a Circuit split, the time is ripe for the Court to resolve the issue.

3. The Decision Below Is Erroneous, As Illustrated By The Solicitor General's Refusal To Defend It Fully

The petition contended that the interpretation of Section 9 adopted by the court below was erroneous, and that its reasoning was fundamentally flawed. In response, the Solicitor

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[6] The *Leslie Salt* case is claimed to reach the same result as the decision below, but that court held, as an alternative to its Section 9 holding, that Congress had consented to the project in question (Md. App. 15a).

General has not defended the general rule adopted by the Fourth Circuit (at the urging of the Corps) — that all dikes within the meaning of Section 9 must completely span a navigable waterway — but has proposed a somewhat different definition of "dike" which includes some structures which do not completely span a body of water (Fed. Resp. Br. 9 n.4, 16 n.11).

Even more importantly, the Solicitor General has backed away from several of the key underpinnings of the decision below. For example, central to the Fourth Circuit's decision was its view that Section 9 was ambiguous, a conclusion supposedly supported by *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929). The petition strenuously attacked this conclusion, and the Solicitor General says nothing about it at all.

Similarly, another crucial element of the Fourth Circuit's decision was its view that Congress was concerned with *dicta* in *United States* v. *Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1890), and *United States* v. *Rider*, 50 F. 406 (S.D. Ohio 1891), when it enacted the 1899 Act, and that this concern caused it to add a Congressional consent provision absent from the 1890 Rivers and Harbors Act. The petition attacked this theory as rank speculation (Pet. 18-19), and pointed out that the 1899 Act did not add a Congressional consent requirement (Pet. 5-6, 18). In response, the Solicitor General concedes the correctness of our position on the supposed change (Fed. Resp. Br. 12-13 n.9), and is completely silent on the allegedly significant *Keokuk* and *Rider* decisions.

Finally, while the court of appeals relied heavily upon administrative practice in upholding the Corps' position, the petition pointed out (as the district court had held, Pet. App. 43a, 48a-49a), that administrative practice was entitled to little or no deference when the agency was interpreting a statute in "bootstrap" fashion so as to expand its own statutory authority (Pet. 19-20). In response, the Solicitor General continues to rely upon administrative practice, but studiously avoids reference to this Court's holdings that such practices are insignificant in these circumstances.[7]

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[7] *S.E.C.* v. *Sloan*, 436 U.S. 103, 118-19 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978); *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

Moreover, the evidence relied upon to support this alleged

The points which respondents do choose to discuss provide little support for the decision below. For example, the Solicitor General attacks petitioners for relying exclusively on labels in defining "dikes" (Fed. Resp. Br. 8), and argues that the proper interpretation of Sections 9 and 10 should turn on the identification of a "reasoned distinction" between those structures which Congress singled out for Congressional review and those entrusted to the Corps (*id.*). However, the court of appeals did not adopt any reasoned distinction, but merely a mechanical rule relating to whether a structure spans a waterway. And no reasoned rule emerges from the federal respondent's current position, save perhaps the rule that a structure is a Section 9 dike when the Corps says that it is.[8]

Respondents urge that Section 9 structures must fundamentally alter a waterway by completely obstructing navigation, or must actually have the potential for such an obstruction (Fed. Resp. Br. 9). We disagree with this approach because it focuses on the effect on navigation of each particular project. Congress has already made a legislative judgment that particular structures (bridges, dams, dikes, and causeways) have a high potential for obstructing navigation, while other structures (wharves, piers, booms, bulkheads, etc.) have a lesser potential for doing so. Congress chose to put all dikes in the former

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long-standing interpretation is exceedingly weak. For example, the Corps' 1977 regulations, adopted after this litigation commenced and in an effort to overturn the *Hudson Valley* precedent by administrative fiat, surely do not demonstrate a long-standing administrative interpretation. The contention that prior regulations defined dikes as structures which spanned waterways (Fed. Resp. Br. 11-12) is simply erroneous. *See, e.g.*, 33 C.F.R. §209.120 (1948). The speeches and affidavits relied upon in this regard are equally unconvincing, as they either lack any specifics concerning Corps practice, or include examples which do not address the question presented herein (*see* Pet. 19-20).

[8] The Corps' *in pari materia* contention (Fed. Resp. Br. 10), which is more properly characterized as *noscitur a sociis*, is totally defeated by its concession that Section 9 applies to some dikes which do not span a body of water. Petitioners also dispute the contention that all causeways or dams completely span a body of water. The *Hudson Valley* causeway, for example, ran along the shoreline. 302 F. Supp. at 1086, 1089.

category, and it is highly inappropriate for the Corps or the judiciary to second-guess that decision with regard to some dikes.[9]

Contrary to respondents' claims (Fed. Resp. Br. 8), petitioners have never claimed that Section 9 should apply to any structure which "may" meet the common definition of "dike," even if it squarely meets the common definition of a bulkhead or some other structure described in Section 10. Our position is that since the structure in question most closely meets the common definition of a dike (rather than the common definition of any structure enumerated in Section 10), it is governed by Section 9, the Section in which Congress placed those structures with a high potential to block navigation. Whether in fact this particular dike will actually obstruct navigation is a question for Congress to consider in the exercise of the powers reserved it by Section 9.

Respondents also continue to rely upon what they call legislative history and administrative practice. However, as noted above, the Solicitor General has admitted that there is virtually no legislative history of the 1899 Act (Fed. Resp. Br. 12 n.9). What respondents really rely upon are snippets of the legislative history of the Clean Water Act of 1972. That Act, however, does not amend Section 9 of the 1899 Act nor approve Corps interpretation of the provision at issue herein.[10] While respondents make much of the Koonce lecture of 1926, it was simply submitted as an exhibit to testimony before a House Committee considering the 1972 Act, which testimony was unrelated to the respective coverage of Sections 9 and 10. It can hardly be said that Congress became aware of, much less acquiesced in, Koonce's statements about the 1899 Act, since the chances are slim that such materials were even seen by the Com-

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[9] The State of Maryland makes the intriguing argument that petitioners have improperly equated the term "dike" with "any dike" (Md. Br. 13). That contention ignores the fact that Section 9 itself employs the term "any . . . dike."

[10] As for materials associated with the 1972 Act, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States* v. *Price*, 361 U.S. 304, 313 (1960).

mittee members. *Guessefeldt* v. *McGrath*, 342 U.S. 308, 317 (1952) (Frankfurter, J.).[11]

In fact, the only real indication of Congress' recent understanding of Section 9's application to structures such as the one at issue favors petitioners' position. In 1970, Congress specifically exempted certain diked disposal sites planned for the Great Lakes from the consent requirement of Section 9. This exemption suggests strongly that such structures were viewed by Congress as within Section 9 unless specifically exempted.[12] And current efforts to obtain Congressional consent for the instant project, S.3170, 96th Cong., 2d Sess. §506 (1980), point to the same conclusion.

In sum, the interpretation of Section 9 below is (a) inconsistent with the plain meaning of the statute and any commonsense interpretation thereof, and (b) unsupportable by any contemporaneous legislative history or long-standing administrative interpretation in which Congress has acquiesced. Thus, not only is the issue presented an important one on which the circuits are divided, but the decision below is erroneous and requires correction lest it continue to stand for principles which even the Solicitor General, who prevailed below, now recognizes to be erroneous.

* * *

On October 6, 1980, this Court granted *certiorari* in Nos. 79-1252 and 79-1502, two petitions arising out of the Peripheral Canal litigation cited above. As stated in the petition (Pet. 13 n.16), petitioners believe that it would be highly desirable to grant *certiorari* herein and set this case in tandem with those cases. Sections 9 and 10 allocate authority over various potential obstructions to navigation among the States, Congress and

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[11] Senator Muskie's quoted remarks (Fed. Resp. Br. 14) about Congressional awareness of Corps practices refer not to the Section 10 permit process, but rather to the Refuse Act Permit Program, which combines responsibilities under the Refuse Act (Section 13 of the Rivers and Harbors Act of 1899) and Section 21(b) of the Federal Water Pollution Control Act.

[12] Respondents' claim that this legislation was a "precautionary clarification" (Fed. Resp. Br. 14 n.10) is unsupported by Congressional materials.

the Corps of Engineers. Since the same legislative background is involved, granting the petition herein will permit this Court to determine in a unified fashion the appropriate demarcations between Congressional, Executive, and State control over projects involving the nation's navigable waterways.

CONCLUSION

For the reasons stated herein and in the petition, this Court should issue a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit.

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